STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

DANIEL HORACEK

Defendant/Appellant.
_____/

Supreme Court
No. 152567

Court of Appeals
No. 317527

Circuit Court
No. 2012-241894-FH

THE PEOPLE'S ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED

CASES PAGE

STATUTES

MISCELLANEOUS AUTHORITIES

RULES

RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT

Following his October 12, 2012 no contest plea pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), Defendant was convicted of one count of Robbery - Unarmed in the Oakland County Circuit Court. On October 30, 2012, in conformity with the *Cobbs* agreement, Defendant was sentenced to 33 months to 40 years in the Michigan Department of Corrections. On July 19, 2013, the Honorable Shalina Kumar denied Defendant's motion to withdraw his no contest plea. Defendant filed a Delayed Application for Leave to Appeal to the Michigan Court of Appeals, which was denied by the Court on September 12, 2013. Defendant subsequently filed an Application for Leave to Appeal in this Court, raising five issues.

On March 28, 2014, this Court entered an Order directing the Oakland County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of the Order. Specifically, this Court requested that the People assume, for the sake of argument, that a Fourth Amendment violation occurred when the police entered Defendant's motel room without a warrant, and that Defendant would have been entitled to withdraw his plea if his motion to suppress had been granted. This Court indicated that "[t]he prosecution shall address whether its consent to the conditional plea, despite its acknowledgment that any error would be harmless, would entitle the defendant to withdraw his plea." The People filed their answer on April 24, 2014.

On October 1, 2014, in lieu of granting leave to appeal, this Court remanded this case to the Court of Appeals to consider 1) whether the Oakland County Circuit Court judge and the assistant prosecutor tacitly or otherwise agreed to a conditional plea in this case, 2) whether Defendant was entitled to withdraw his plea, and 3) whether Defendant's ability to withdraw his plea was impacted by the prosecutor's statement that any Fourth Amendment violation would be

harmless beyond a reasonable doubt because there was sufficient untainted evidence to prosecute Defendant. After the parties filed their responsive briefs, the Court of Appeals affirmed Defendant's conviction, finding that the trial court did not err in finding exigent circumstances warranted the immediate intrusion into the motel room where Defendant was located. Because the court found that there was no Fourth Amendment violation, it declined to determine whether Defendant's plea was conditional, but recognized that, because Defendant still would have been successfully prosecuted even if the pretrial ruling had been decided in his favor, he would still not be entitled to relief.

On or about November 4, 2015, Defendant filed a second Application for Leave to Appeal in this Court, making the same contentions that were decided against him by the Court of Appeals, as well as an additional argument about court fees. On May 6, 2016, this Court again entered an Order directing the Oakland County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of the Order. The Order indicates:

> … In particular, the prosecutor should address: (1) what exigencies, if any, existed at the time of the defendant's warrantless arrest … (2) whether those exigencies justified the defendant's warrantless arrest; (3) whether the defendant's plea in this case was made conditional in light of the tacit consent of the trial court and the prosecutor; (4) whether MCR 6.301(C)(2) fully incorporates the conditional plea procedure in People v Reid, 420 Mich 326 (1984) …; and (5) if there was a Fourth Amendment violation, whether the defendant is entitled to withdraw his plea. [Order dated 5/6/16. Citations omitted].

The People now file the instant Answer within 28 days of the Court's Order. This Court has jurisdiction to consider Defendant's Application pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER DEFENDANT'S ARREST VIOLATED HIS FOURTH AMENDMENT RIGHTS WHERE SHERIFF'S DEPUTIES HAD PROBABLE CAUSE TO BELIEVE THAT DEFENDANT COMMITTED AN ARMED ROBBERY AND WAS HOLED UP IN A MOTEL ROOM WITH MULTIPLE OCCUPANTS, PROVIDING AN OPPORTUNITY FOR THE LIKELY ARMED SUSPECT AND OTHER OCCUPANTS TO DESTROY EVIDENCE AND/OR PREPARE FOR A STAND-OFF WITH POLICE?

Defendant contends the answer is, "Yes."

The People contend the answer is, "No."

II. WHETHER DEFENDANT'S PLEA WAS A CONDITIONAL PLEA PURSUANT TO MCR 6.301(C)(2)?

Defendant contends the answer is, "Yes."

The People contend the answer is, "unclear."

III. ASSUMING THAT THERE WAS A CONDITIONAL PLEA IN THIS CASE, WHETHER DEFENDANT IS ENTITLED TO WITHDRAW HIS PLEA WHERE THIS COURT HAS ALREADY DETERMINED THAT DEFENDANT'S SPECIFIED ISSUES ARE WITHOUT MERIT?

Defendant contends the answer is, "Yes."

The People contend the answer is, "No."

IV. WHETHER DEFENDANT'S ENTITLEMENT TO RELIEF IS GREATLY IMPACTED BY THE FACT THAT ANY 4TH AMENDMENT VIOLATION WOULD BE HARMLESS BEYOND A REASONABLE DOUBT WHERE THERE IS OVERWHELMING "UNTAINTED" EVIDENCE OF HIS GUILT?

Defendant contends the answer is, "No."

The People contend the answer is, "Yes."

COUNTER-STATEMENT OF FACTS

Daniel Horacek, hereinafter referred to as Defendant, was initially charged with one count of Armed Robbery, contrary to MCL 750.529. Following a preliminary examination in the 52-3rd District Court, the charge was reduced by the court to one count of Unarmed Robbery, contrary to MCL 750.530, after the magistrate found that the act of putting his left hand into his jacket pocket and pointing it at the victim was insufficient evidence for bindover that Defendant was "armed" when he took the money from the victim.

This case involved Defendant robbing Sarah Halyckyj at the Dollar Value Plus store in Orion Township on June 4, 2012. As written in the Agent's Description of the Offense contained within Defendant's Presentence Investigation Report (hereinafter PSIR), the facts in this case which formed the basis of Defendant's no contest plea are as follows:

> On June 4, 2012 at approximately 8:57pm Oakland County Sheriff Deputies responded to Dollar Value Plus, located at 1095 S. Lapeer Road in Orion Township, MI in regards to an armed robbery in progress. Victim Sarah Halyckyj advised she was waiting to close the store when a white male subject, later identified as Daniel Horacek, came into the store. Horacek was in the store for some time and eventually came to the counter with a candle. Horacek stated that he forgot his wallet and was going to retrieve it. A short time later Horacek pulled up his vehicle very fast in the front of the store. Horacek reentered the store and was looking all around. Horacek then stated "Look Ma'am, I don't want to scare you, but I need you to open the register." Halyckyj thought he was joking at first and told Horacek she could not do that, but he became upset. Horacek had his hands in his pockets. Halyckyj was afraid that he had some kind of weapon and that he was going to shoot her. Horacek told her "Just open the register." Halyckyj was scared that he was going to hurt her or shoot her. He told her to "put it in the bag". Horacek took the bag and exited through the front door. He entered a silver car and drove off quickly.
>
> The store surveillance video was reviewed, and the subject appeared to be Daniel Horacek. Horacek is a suspect in several B & E's in the area. In the video, Horacek is seen talking to Halyckyj with his left hand in his left coat pocket. Horacek makes at least two motions from his left pocket pointing at Halyckyj. The vehicle in the video also matched the vehicle that Horacek is known to drive. The suspect information was relayed over dispatch, and a short time later Auburn Hills Police located the suspect vehicle at Roadway Inn (1471 N. Opdyke Road).

> Hotel staff advised that Horacek had rented out room 427, and perimeter was set up. Police knocked on the door and heard several people suddenly moving around inside. No one answered the door so a key card was used to unlock it, but the door latch kept the door from fully opening. Police observed a male subject grab something from under the bed and move it out of sight. Other people in the room were running away from the door and ignored orders to get on the floor and show their hands. The door was finally breached open. Officers observed heavy smoke and detected the smell of burned crack. Four subjects were located in the room including Horacek.
>
> Horacek was later interviewed and originally denied being involved. He later stated in the interview that he only did it because "Jack and Dave" were demanding money from him. Horacek stated that he went out to his car and was told by Jack that he had to do this. Horacek could not provide the details of Jack's vehicle. Horacek admitted that he came back into the store for the second time and told the clerk to put the money in the bag. (PSIR, 3).

Prior to the date set for trial, Defendant's attorney filed a motion to suppress, arguing that the police violated Defendant's 4th Amendment rights against unreasonable search and seizure when they broke down the door of the motel room to arrest Defendant without first obtaining a search warrant. Defense counsel argued that the police had the opportunity to obtain the search warrant and that they should have waited rather than kicking in the door. (Motion and Plea transcript dated 10/12/12, hereinafter MT, 3-4). In addition, defense counsel acknowledged:

> Ultimately, there are, I believe, a total of four people who are arrested. There are some narcotics, paraphernalia, and other things found in there of which the officers at least didn't lay out in their report that they knew of anything. *My client was not charged with anything related to that*. But my client was arrested as a result of that. He was then taken into the police department and given Miranda and gave a statement.
>
> *It is our position that any and all evidence found in the hotel room, because of the illegal entry, and the statement need to be suppressed*. (MT, 4. Emphasis added).

In response, the assistant prosecutor argued:

> Your Honor, from [defense counsel] Mr. Lynch's motion, it was a little bit unclear as to what he was seeking the Court to suppress. Based on his oral argument, *it appears that he's looking for suppression of items found in the motel room and also his statement*. I'll address the statement first.

> Even if the Court finds that it was an illegal entry and illegal arrest, People v Kelly, and I cited this case in my brief, indicates that a custodial confession following an illegal arrest would not be suppressed as long as there was sufficient probable cause to arrest the defendant.
>
> In this case, there's ample probable cause. We'd have the – At that time when the officers come and they go to this Dollar Value store, they look at the video. The deputy recognizes it as the defendant. And I've cited in my brief that Detective Richardson or Detective Randolph and other officers are already looking for the defendant prior to this because of some other B & E's. And they're actually looking for that particular vehicle. They then find it at the Roadway Inn. So they had probable cause as to this incident before the statement was taken. Then he's read Miranda, he's properly Mirandized.
>
> As to the illegal entry, if you will, that Mr. Lynch raises, I've laid out in my brief, cited the same case that Mr. Lynch cited, People v Oliver, all the exigent circumstances in this case.
>
> * * *
>
> Based on all those factors, the entry was appropriate based on exigent circumstances. (MT, 6-8. Emphasis added).

In denying Defendant's motion to suppress, Judge Kumar found exigent circumstances in this case, indicating:

> The exigent circumstances in this case are that a serious offense, a crime of violence is involved. The suspect is reasonably believed to be armed. At the time he was reasonably believed to be armed. Whether there was a clear showing of probable cause. And based on the video and the description of the vehicle, there was probable cause. And whether there's a strong reason to exist – to believe that the defendant – Whether there was strong reason to exist (sic) to believe the defendant was in the motel room at the time. And based on his vehicle being seen in the parking lot, there was that strong reason to believe he was in the motel room at the time.
>
> Also, although the prosecutor didn't say this, I think there was a likelihood that the suspect would escaped (sic) – would have escaped if they had not got in and got him at that point.
>
> And there was an issue of preventing destruction of evidence, as well as ensuring the safety of law enforcement, since there was a reasonable belief at the time that the defendant was armed.
>
> Because of all those exigent circumstances, I think the entry was legal.
>
> *And when it comes to the statement, even if the entry was not legal because, again, I find that there was probable cause to arrest this defendant, I wouldn't suppress the statement in any event*.
>
> So, therefore, I'm denying the defendant's motion. (MT, 9-10. Emphasis added).

After some further discussions occurred regarding the matter being set for trial and Defendant's desire to argue a motion to quash, the assistant prosecutor added:

> My position is even if the Court ruled against me on this Fourth Amendment issue, and the Court has not, the – we'd still be able to proceed because we have the testimony of the victim, we have the video. And we'd still be able to proceed. And that's the testimony Judge Asadoorian heard, which was the basis for the bindover on the reduced charge of unarmed robbery so – (MT, 19).

As will be discussed more fully, *infra*, the court and defense counsel then engaged in a colloquy with Defendant regarding the preservation of his issues for appellate review. (MT, 19-23). It was thereupon determined that, despite the court and defense counsel's indications that his issues would be "preserved", Defendant would argue his own motion to quash in order to "make sure that everything's preserved properly." (MT, 24).

After the arguments were made by Defendant and the assistant prosecutor, the court denied Defendant's motion to quash, finding:

> The witness's testimony was he had something in his pockets and that she was concerned whether there was something in there that could hurt her or not, --
>
> * * *
>
> This is an abuse-of-discretion standard. It's a very high standard. And based on the transcript and the victim's testimony, specifically that she was concerned whether there was something in his pocket with which he could hurt her or that he could hurt her with, that substantiates probable cause to bind over on unarmed robbery. (MT, 34).

After both motions were denied by the trial court, defense counsel indicated:

> Your Honor, I believe based upon my previous discussions with my client, now that those issues are preserved, that he will enter a plea of no contest to the Cobbs (sic) 33 at the low end. (MT, 34-35).

Thereafter, Defendant tendered his no contest plea, with the understanding that the court would not exceed 33 months as the minimum sentence. (MT, 35). Defendant also acknowledged that he had at least three prior felonies at the time of his plea. (MT, 40-41).

On October 30, 2012, and *in conformity with the sentencing agreement*, Judge Shalina Kumar sentenced Defendant to a minimum term of 33 months and a maximum term of 40 years in the Michigan Department of Corrections. Defendant received credit for 148 days served. Defendant, with the assistance of court-appointed counsel, filed a motion to withdraw his plea. On July 19, 2013, Judge Kumar denied Defendant's motion. On September 12, 2013, the Court of Appeals denied Defendant's Delayed Application for Leave to Appeal "for lack of merit on the grounds presented."

Defendant thereafter filed an Application for Leave to Appeal to this Court. On March 28, 2014, this Court entered an Order directing the Oakland County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of the Order. Specifically, the Court requested that the People assume, for the sake of argument, that a Fourth Amendment violation occurred when the police entered Defendant's motel room without a warrant, and that Defendant would have been entitled to withdraw his plea if his motion to suppress had been granted. This Court indicated that "[t]he prosecution shall address whether its consent to the conditional plea, despite its acknowledgment that any error would be harmless, would entitle the defendant to withdraw his plea."

On April 24, 2014, the People filed a brief in response to the Court's questions and Defendant's Application for Leave to Appeal. On October 1, 2014, this Court remanded the case to the Court of Appeals "as on leave granted", asking the parties to address, and the Court of Appeals to consider:

> . . . whether the defendant's warrantless arrest violated his Fourth Amendment rights. If it did, then the Court of Appeals should consider: (1) whether the Oakland Circuit Court and the prosecutor consented, tacitly or otherwise, to entry of the defendant's nolo contendre plea to unarmed robbery, conditioned on the defendant's ability to challenge on appeal the trial court's denial of his motions to

> suppress the evidence and to quash the bindover, see MCR 6.301(C)(2); (2) whether the defendant is entitled to withdraw his plea pursuant to MCR 6.301(C)(2); and (3) whether the defendant's entitlement to relief is impacted by the prosecutor's statement at the plea hearing that any Fourth Amendment violation would be harmless beyond a reasonable doubt because there was sufficient untainted evidence to prosecute the defendant, see *People v Reid*, 420 Mich 326, 337 (1984). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

Pursuant to Defendant's request, his original Brief After Remand was stricken by the Court of Appeals on February 5, 2015. Defendant's Brief on Appeal After Remand was filed on April 30, 2015.[1] The People filed their responsive Brief on July 2, 2015, and the Court of Appeals (Judges Talbot, Wilder and Fort Hood) affirmed Defendant's conviction. After considering the factors as set forth in *People v Oliver*, 417 Mich 366; 338 NW2d 167 (1983), the Court of Appeals found, *inter alia*:

> . . . Overall, we conclude that more factors support the finding of an exigency, and the factors that do favor exigency are of greater weight and severity than those that favor defendant. Therefore, we conclude that the trial court did not err in finding that defendant's warrantless arrest did not violate his Fourth Amendment rights. (*Horacek*, *supra* at slip op 3).

In addition, after finding that it was unnecessary to consider whether Defendant's plea was conditional and whether Defendant was entitled to withdraw his plea, the court wrote:

> …However, we note that, even assuming the search was unconstitutional, defendant's plea was not conditional pursuant to *People v Reid*, 420 Mich 326. While MCR 6.301(C)(2) would permit defendant to revoke a conditional plea if "a specified pretrial ruling is overturned on appeal," MCR 6.301(C)(2) does not specify the definition or requirements of a conditional plea. In *Reid*, the Court established the use of conditional pleas where (1) the defendant pleads guilty, (2) the parties and the court agree that the plea is conditioned on the defendant's right to appeal an adverse pretrial ruling, and (3) *the defendant could not be prosecuted if the pretrial ruling is decided in his favor*. *Reid*, 420 Mich at 337. Here, it is

[1] Defendant additionally argued that he should not have been ordered to reimburse the county for the costs of his trial and appellate counsel, however, since this Court did not specifically order the Court of Appeals on remand to address the issue, the Court declined Defendant's invitation to expand the issues. [See *People v Horacek*, unpublished opinion per curiam of the Court of Appeals, issued 9/15/15 (Docket No. 317527), slip op 1-2, fn 2].

> clear that defendant could still be prosecuted even without the admission of his statement. At the plea hearing, the prosecutor stated that any Fourth Amendment violation would be harmless beyond a reasonable doubt because there is sufficient untainted evidence to prosecute the defendant. Further, the prosecutor has made clear on appeal that it will proceed against defendant if the case is remanded. (*Horacek*, *supra* at slip op 4. Emphasis in original).

On or about November 4, 2015, Defendant filed another Application for Leave to Appeal, alleging that his plea was conditional, that his Constitutional rights were violated by the illegal entry into his motel room, and that he should not have been assessed costs for his trial and appellate counsel by the Oakland County Circuit Court. On May 6, 2016, this Court directed the Oakland County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of the order. This Court indicated:

> … In particular, the prosecutor should address: (1) what exigencies, if any, existed at the time of the defendant's warrantless arrest … (2) whether those exigencies justified the defendant's warrantless arrest; (3) whether the defendant's plea in this case was made conditional in light of the tacit consent of the trial court and the prosecutor; (4) whether MCR 6.301(C)(2) fully incorporates the conditional plea procedure in *People v Reid*, 420 Mich 326 (1984) …; and (5) if there was a Fourth Amendment violation, whether the defendant is entitled withdraw his plea. [Order dated 5/6/16. Citations omitted].

This is the People's Answer in response to the Court's inquiries. The Answer is being filed within 28 days of the date of the Order. Due to the nature of the claims on appeal, additional pertinent facts will be discussed in the body of the argument section of this brief, *infra*, to the extent necessary to fully advise this Honorable Court as to the issues raised by Defendant on appeal.

ARGUMENT

I. DEFENDANT'S ARREST DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS WHERE SHERIFF'S DEPUTIES HAD PROBABLE CAUSE TO BELIEVE THAT DEFENDANT COMMITTED AN ARMED ROBBERY AND WAS HOLED UP IN A MOTEL ROOM WITH MULTIPLE OCCUPANTS, PROVIDING AN OPPORTUNITY FOR THE LIKELY ARMED SUSPECT AND OTHER OCCUPANTS TO DESTROY EVIDENCE AND/OR PREPARE FOR A STAND-OFF WITH POLICE.

Standard of Review:

The People agree that this Court considers questions of constitutional law *de novo* and findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Discussion:

From the onset, it should be noted that this Court may be under an incorrect assumption regarding the evidence seized from the motel room. Besides Defendant himself, and an exculpatory statement from him that "Jack and Dave" forced him to take the money, no other evidence from the motel was, or will be, used against him because it is irrelevant to the charged offense. Nonetheless, this Court has asked the People to address the seizure.

The Fourth Amendment to the Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" US Const Am IV. See also Const 1963, Art 1 § 11. The touchstone of the 4th Amendment is reasonableness, and reasonableness requires a fact-specific inquiry, which is ultimately measured by examining the totality of the circumstances. *Cady v Dombrowski*, 413 US 433, 439; 93 S Ct 2523; 37 L Ed 2d 706 (1973); *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996). The reasonableness of a Fourth Amendment seizure balances the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference. *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993).

An arrest requires probable cause; that is, "whether at th[e] moment [of arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v Ohio*, 379 US 89, 91; 85 S Ct 223; 13 L Ed 2d 142 (1964), citing *Brinegar v United States*, 338 US 160, 175-176; 69 S Ct 1302; 93 L Ed 2d 1879 (1949); and *Henry v United States*, 361 US 98, 102; 80 S Ct 168; 4 L Ed 2d 134 (1959). Probable cause for an arrest is a lower burden of proof than the amount of probable cause for bindover after preliminary examinations. *People v Cohen*, 294 Mich App 70, 75-76; 816 NW2d 474 (2011). To effectuate an arrest of the occupant of a motel room, police must have probable cause and either a warrant or exigent circumstances. *People v Oliver*, 417 Mich 366, 379-380; 338 NW2d 167 (1983); See also *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). In this case, the police officers had probable cause and exigent circumstances.

The Police had Probable Cause to Arrest Defendant:

There can be little dispute that, at the time of his arrest, officers had probable cause to believe that Defendant had committed a felony, namely, an armed robbery or, at least, an unarmed robbery. The elements of armed robbery are: (1) an assault, (2) accompanied by a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon as described in the statute. *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (2000); see also MCL 750.529. The robbery statute clarifies that a person is guilty of *armed* robbery if he commits a robbery and:

> . . .in the course of engaging in that conduct, possesses a dangerous weapon *or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon*[.] [Emphasis added].

As our courts have previously recognized in *People v Taylor*, 245 Mich App 293, 299; 628 NW2d 55 (2001), quoting *People v Jolly*, 442 Mich 458, 469-470; 502 NW2d 177 (1993):

> …[t]he existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon *or an article used or fashioned to look like one*. Related threats, whether verbal or gesticulatory, further support the existence of a weapon or article. [Emphasis added].

Although the district court judge disregarded the above, it is clear that the officers had probable cause to arrest Defendant for armed robbery.[2] According to the incident report in the instant case, Deputy Richardson, the responding officer, interviewed the victim shortly after the 911 dispatch was received, and he viewed the store's video recording. The in-store video, copies of which are being sent to this Honorable Court, clearly shows Defendant simulating a gun inside his left jacket pocket. The victim indicated that she believed Defendant had something in his pocket which he could use to hurt her. Deputy Richardson recognized Defendant as the object of a BOL (or Be On the Lookout) for a burglary that same day and on five burglaries from five days prior. Deputy Richardson also recognized the getaway car that the suspect was driving – a silver Dodge Caliber bearing license plate number CHG4840. Deputy Randolph, the Oakland County Sheriff's Office detective, knew that Defendant had rented the vehicle from his investigation of the six burglaries, and after speaking to Defendant's mother and a rental car company.

As such, at the moment of Defendant's arrest, "the facts and circumstances within [the deputies'] knowledge and of which they had reasonably trustworthy information was sufficient to warrant a prudent man in believing that [Defendant] had committed or was committing an offense." *Beck*, 379 US at 91.

[2] As will be discussed more fully, *infra*, because Defendant tendered a no contest plea, the People opted not to pursue an appeal or other relief of the district court's charge reduction. Should the matter be returned to the pre-trial stage, the People would strongly consider seeking appellate relief to reinstate the initial charge of armed robbery.

Exigent Circumstances Support the Immediate Entry Into the Motel Room:

The arrest in this case was not unlawful where the police had reason to believe that Defendant had committed a serious crime, that it involved the use of a firearm, and there was cause to believe that Defendant was inside the motel room (where they could hear people moving around), suggesting that the occupants might destroy evidence and/or prepare for a stand-off with the police, which could endanger the police and nearby individuals. The exigent circumstances presented here support Judge Kumar's denial of the motion to suppress.

In determining whether the exigent circumstances doctrine applies to a warrantless arrest from a motel room, "[t]he question is whether a reasonable person would have perceived a need to immediately secure the motel room." *Oliver*, *supra* at 383. The *Oliver* Court primarily focused the exception on seven factors, which Judge Kumar (and later the Court of Appeals) considered when denying Defendant's motion and affirming his conviction.

The seven factors (and why they pointed to the exigency of the situation) include: (1) whether a serious offense, particularly a crime of violence, is involved (robbery is most definitely a crime of violence); (2) whether the suspect is reasonably believed to be armed (the victim testified that she did not know what was in Defendant's pocket but feared that it could have been "something that might hurt her"; the video of the robbery supports her testimony); (3) whether there is a clear showing of probable cause (addressed above); (4) whether strong reason exists to believe the defendant is in the premises (Defendant's car was at the motel, it was he who rented the room, and several people were heard within the room); (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended (arguably, because the police could have spent their resources keeping 9 to 10 officers surrounding the motel, it is not likely that Defendant could have escaped, however, others would have been placed in danger pending

issuance of the warrant while the police waited); (6) whether the entry is forcible (admittedly, after the occupants inside ignored the knock and announce, the police entered by force); (7) whether the entry is at night (due to the time of the arrest, it does appear to have been at night, but it is unclear how this has a great effect on the outcome); (8) whether it helps to prevent the destruction of evidence (the record supports a finding that one of the occupants of the motel room was attempting to destroy evidence, or at least running toward the bathroom, when the police entered); (9) ensuring the safety of law enforcement and other citizens [see the response to (5); there were other guests registered at the motel, and the raid was conducted at night]; and (10) the ability to secure a warrant (had it been requested, the police would have secured a warrant, but due to the exigencies, the police had to act quickly). *Oliver*, *supra* at 384.

As indicated, in denying Defendant's motion to suppress, Judge Kumar found that the circumstances in this case were exigent and that there were a number of reasons why it was not reasonable for the police to have waited for the warrant to be secured: namely, that there was very strong (more than probable cause) evidence to believe that Defendant was in the motel room, that he was quite possibly armed, that there were others in the room with him, and that there was a good possibility that Defendant or the occupants might, or could, destroy evidence. (MT, 9-10). Importantly, Judge Kumar recognized that moving sooner than later better ensured the safety of the officers and of the other occupants of the motel. *Oliver*, *supra*. The exigent circumstances presented by the particular facts in this case, known to the officers at the time of the arrest, warranted moving in sooner than later. The Court of Appeals agreed, indicating, "[o]verall, we conclude that more factors support the finding of an exigency, and the facts that do favor exigency are of greater weight and severity than those that favor defendant." (*Horacek*, *supra* at slip op 3).

Dismissal of the Charges, or Suppression of Defendant's Body, is Not the Remedy:

Moreover, even assuming that the arrest in this case was improper or premature, an unlawful arrest **does not** oust the trial court of jurisdiction to try the arrestee for a crime. *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974). It was Defendant's contention during his initial motion in the circuit court that the remedy for an unlawful arrest was to dismiss the charges against him, or to "quash" the charges against him. The remedy for an illegal arrest, however, generally "has been the suppression of evidence obtained from the person following his illegal arrest." *Id*. In this case, Defendant was not charged with any of the crimes found as a result of entering the motel room, therefore, there was no evidence to suppress. Moreover, the only statement that Defendant made (ie, that Jack and Dave made him do it), was exculpatory in nature, therefore, it was not used, nor would it be necessary, to convict him. Had Defendant been charged with the drug offenses from the motel room, or for possession of drug paraphernalia, then perhaps he would have an argument. However, since the robbery of Sarah Halyckyj was separate and distinct from the offenses in the motel room, Defendant is entitled to no relief.

In addition, the United States Supreme Court has held that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after" a warrantless arrest. *New York v Harris*, 495 US 14, 21; 110 S Ct 1640; 109 L Ed 2d 13 (1990). Any statements that Defendant might have made after the arrest *could* have been used against him because there was probable cause for his arrest based on the overwhelming untainted evidence of his guilt, but, as noted, Defendant did not make any inculpatory statements upon his arrest, and the People did not use, nor do they intend to use, any of the statements he made against him in the prosecution

As indicated, suppression of the evidence, not dismissal of the charges is the remedy for an illegal search and seizure. *People v Chambers*, 195 Mich App 118, 120; 489 NW2d 168 (1992), citing *People v Dalton*, 155 Mich App 591, 597; 400 NW2d 689 (1986). See also *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992), citing *Burrill*, *supra* at 133; *Dalton*, *supra* at 597, and *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). In this case, even if the court had found that the entry into the motel room was not justified without a warrant, suppression of the evidence and not dismissal is the remedy. Since there was no evidence used against Defendant in the motel room, and he did not make any inculpatory statements, the issue of the arrest is inconsequential in this case.

Judge Kumar was correct in denying Defendant's motion to suppress where there was both probable cause to make the arrest, and exigent circumstances, and the Court of Appeals was correct in affirming Defendant's conviction. Because none of the evidence seized in the search of the motel room was used against Defendant, even if the arrest was illegal, he has no basis to complain; he is not entitled to relief.

II. THE RECORD IS UNCLEAR AS TO WHETHER DEFENDANT'S PLEA WAS A CONDITIONAL PLEA PURSUANT TO MCR 6.301(C)(2), HOWEVER, EVEN IF THE TRIAL COURT AND THE PEOPLE TACITLY AGREED TO A CONDITIONAL PLEA, DEFENDANT STILL HAD THE ABILITY TO FILE AN APPLICATION FOR LEAVE TO APPEAL, AND THE APPLICATION WAS NOT DENIED DUE TO A LACK OF ISSUE PRESERVATION BUT BECAUSE DEFENDANT'S CLAIMS LACKED MERIT.

Standard of Review:

Generally, an issue involving the interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews *de novo*. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

Discussion:

This Court asks the Oakland County Prosecuting Attorney to address whether the circuit court and the prosecutor consented, whether tacitly or otherwise, to entry of Defendant's nolo contendere plea on condition of Defendant's ability to challenge on appeal the trial court's denial of his motion to suppress and motion to quash the bindover. Although Defendant did not brief the issue in the Court of Appeals, he does raise it in Application for Leave to Appeal. The record is unclear as to whether the trial court and the People consented, however, even if the assistant prosecuting attorney (APA) and the trial court did consent, Defendant still cannot demonstrate entitlement to relief where, in his application to the Court of Appeals, his issues were considered by this Court and denied for "lack of merit on the grounds presented", not because the issues were not preserved. Thereafter, following remand from this Court, the Court of Appeals heard and rejected Defendant's argument that he was entitled to dismissal or plea withdrawal.

As indicated, Defendant contends on appeal that he should now be permitted to withdraw his no contest plea where he was led to believe that he preserved for appellate review the alleged 4th Amendment violation. Under *People v New*, 427 Mich 482; 398 NW2d 358 (1986), a no

contest plea waives the right to challenge on appeal a denial of a pretrial motion to suppress. During his motion hearing, however, Defendant repeatedly indicated that he was making his arguments in order to "preserve" the issue for appeal. His attorney and the court assured him that, by raising and arguing the issues, his claims were "preserved". (MT, 17-19). The APA did not actively participate in the discussions of whether or not the issues would be "preserved" but rather indicated only:

> Well, my – I don't want to get into all of this if then --
> *My position is even if the Court ruled against me on this Fourth Amendment issue*, and the Court has not, the – *we'd still be able to proceed because we have the testimony of the victim, we have the video*. And we'd still be able to proceed. And that's the testimony Judge Asadoorian heard, which was the basis for the bindover on the reduced charge of unarmed robbery so – (MT, 19. Emphasis added).

After the trial court and defense counsel indicated that Defendant's motion to suppress and motion to quash would be preserved for appellate review, defense counsel indicated:

> MR. LYNCH: Yes. And I guess – I just want to make sure that – I believe that my client will enter a plea of no contest pursuant to the Cobbs evaluation.
> However, prior to doing that, I would ask the Court to at least state on the record that not only is – the Fourth Amendment issues are preserved but his ability, if needed, to then file a motion to quash. Is that correct? So that he can appeal
> Is that what you're asking, Mr. Horacek?
> THE COURT: Yes, both issues will be preserved for appeal. Yes.
> MR. LYNCH: Is that – And I believe that that accomplishes what you want.
> Our disagreement, quite frankly, is he felt that there needed to be an interlocutory appeal. My belief was that he would not – this Court wouldn't grant interlocutory appeal; it would proceed with trial on Monday.
> THE COURT: Correct.
> MR. LYNCH: And let those issues be hammered out in appellate – somewhere down the road in an appeal, should he be convicted.
> THE COURT: Correct.
> MR. LYNCH: Now this Court having stated those issues are preserved, he accomplishes what he wants and that – those issues are ripe for being looked at in the appellate courts.
> THE COURT: Correct.

> MR. LYNCH: Do you understand that, Mr. Horecek?
> MR. HORACEK: Okay. Just as long as – I believe I understand it. Again, I apologize, your Honor. I'm just – I'm being very careful to – It's not that I'm trying to –
> THE COURT: I understand.
> MR. HORACEK: -- nitpick here. It's – I read something from the law library and it says I have to do something, and I just wanted to raise it. That's what –
> THE COURT: Your issue's –
> MR. HORACEK: -- this was all about.
> THE COURT: -- preserved. Your issue's preserved for appeal. (MT, 20-21).

The court indicated to Defendant how she thought the appellate process would work regarding both his 4th Amendment and motion to quash issues. (MT, 21-23). Again, the APA did not actively participate in the conversation. (MT, 19-24). Ultimately, it was determined that Defendant would argue his own motion to quash, contending that there was insufficient evidence to bind him over on the unarmed robbery charge and, at best, the facts supported a larceny from a building or larceny from a person. (MT, 24-34). The court denied the motion. (MT, 34). Defendant then tendered his no contest plea pursuant *People v Cobbs* whereby the court would sentence him below the guidelines to a minimum term of 33 months in prison. (MT, 34-39). Defendant, who had 19 prior felonies, acknowledged his habitual offender status. (MT, 40-41).

MCR 6.301(C) states, in pertinent part:

> A defendant may enter the following pleas only with the consent of the court and the prosecutor:
>
> * * *
>
> (2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and *entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal*. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. *The appeal is by application for leave to appeal only*. (Emphasis added).

In this case, defense counsel and the trial court informed Defendant that his issues were preserved by bringing them up before trial. At no time did anyone mention that Defendant's plea was "conditional", but rather, only indicated that the issues were "preserved". The assistant prosecutor did not actively participate in the discussion, and never expressed his consent to a conditional plea. Rather, he indicated only that the People could proceed to trial even if the court ruled in favor of Defendant on the Fourth Amendment issue. (MT, 19).

Despite the obvious failures to follow the requirements of MCR 6.301(C)(2), the lack of specificity, and the lack of consent from the People, if the APA's silence is sufficient to qualify as consent, then it could reasonably be argued that Defendant's no contest plea was conditional. If his plea was conditional, then the question becomes whether or not there is merit to his claims under the 4th Amendment and his claim that there was insufficient evidence to warrant his bindover in this case.[3] As will be discussed in Argument III, even assuming that the plea was conditional, because Defendant still would not be entitled to dismissal of the charges against him if the motion had been granted, and because the People have always maintained that there was sufficient evidence to proceed to trial even if the motion to suppress had been granted, Defendant is not entitled to withdraw his plea.

[3] In its Opinion, the Court of Appeals found that, since they determined that the entry into the motel room to arrest Defendant was proper under the exigent circumstances exception, they found it "unnecessary for us to consider whether defendant's plea was conditional and whether defendant was entitled to withdraw his plea." As will be discussed in Argument III, the Court went on, however, to find that, even if the plea was conditional, Defendant still would not be entitled to relief. (Horacek, supra at slip op 4).

III. ASSUMING THAT THERE WAS A CONDITIONAL PLEA IN THIS CASE, BECAUSE THE COURT OF APPEALS HAS ALREADY DETERMINED THAT DEFENDANT'S SPECIFIED ISSUES WERE WITHOUT MERIT, HE IS NOT ENTITLED TO WITHDRAW HIS PLEA.

Standard of Review:

A motion to withdraw a guilty plea is a matter within the trial court's discretion and the trial court's decision will not be disturbed unless there is an abuse of discretion *People* v *Kennebrew*, 220 Mich App 601; 560 NW2d 354 (1996). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008).

Discussion:

MCR 6.301(C)(2) states that, "[a] conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal….The appeal is by application for leave to appeal only." In this case, following the denial of his motion to withdraw his no contest plea, on August 6, 2013, Defendant filed a Delayed Application for Leave to Appeal in the Court of Appeals, alleging that the trial court erred in denying his motions to suppress and quash the bindover. Court of Appeals Judges Patrick M. Meter, Peter D. O'Connell and Donald S. Owens considered Defendant's Application, and on September 12, 2013, "DENIED for lack of merit in the grounds presented." They did not deny the Application because the issues were unpreserved, or because Defendant's appeal had not been perfected; rather, they denied for *lack of merit*. Because the "specified pretrial ruling" was not "overturned on appeal" [MCR 6.301(C)(2)], the conditions of the conditional plea were not met. Therefore, under the terms of the court rule, plea withdrawal is unwarranted in this case.

Thereafter, on October 1, 2014, in lieu of granting leave to appeal, this Court remanded this case to the Court of Appeals to consider as on leave granted, *inter alia*, whether Defendant is entitled to withdraw his plea pursuant to MCR 6.301(C)(2), and whether [citing *People v Reid*, 420 Mich 326, 337 (1984)] his potential entitlement to relief is impacted by the prosecutor's statement at the plea hearing that any 4th Amendment violation would be harmless because there was sufficient untainted evidence to prosecute Defendant. In response to this Court's questions, the Court of Appeals (Judges Talbot, Wilder and Fort Hood) wrote:

> Based on our disposition, it is unnecessary for us to consider whether defendant's plea was conditional and whether defendant was entitled to withdraw his plea. However, we note that, even assuming the search was unconditional, defendant's plea was not conditional pursuant to *People v Reid*, 420 Mich 326. While MCR 6.301(C)(2) would permit defendant to revoke a conditional plea if "a specified pretrial ruling is overturned on appeal," MCR 6.301(C)(2) does not specify the definition or requirements of a conditional plea. In *Reid*, the Court established the use of conditional pleas where (1) the defendant pleads guilty, (2) the parties and the court agree that the plea is conditioned on the defendant's right to appeal an adverse pretrial ruling, and (3) the defendant could not be prosecuted if the pretrial ruling is decided in his favor. *Reid*, 420 Mich at 337. Here, it is clear that defendant could still be prosecuted even without the admission of his statement. At the plea hearing, the prosecutor stated that any Fourth Amendment violation would be harmless beyond a reasonable doubt because there was sufficient untainted evidence to prosecute the defendant. Further, the prosecutor has made clear on appeal that it will proceed against defendant if the case is remanded. [*Horacek*, *supra* at slip op 4].

Because it is unquestionable that the People can proceed against Defendant without using the "fruits" of what Defendant alleges to be an illegal search, there is no question that under the ruling in *People v Reid*, Defendant is unable to demonstrate that he is entitled to relief. The People agree with the Court of Appeals that MCR 6.301(C)(2) fails to specify the definition or requirements of a conditional plea, and further agree that "it is clear that defendant could still be prosecuted even without the admission of his statement." [*Horacek*, *supra* at slip op 4]. The question remains, however, whether MCR 6.301(C)(2) mandates the same result.

In *People v Reid*, this Court found:

> In sum, we hold that a defendant in a criminal case may, after pleading guilty, appeal a decision denying a motion to suppress evidence *where, as here, **the defendant could not be prosecuted** if his claim that a constitutional right against unreasonable search and seizure was violated is sustained and the defendant, the prosecutor, and the judge have agreed to the conditional plea*. If they so agree, the defendant may offer a conditional plea of guilty, and, after his conviction on such a plea, he may appeal from the adverse ruling on his search and seizure claim. If the defendant's claim is sustained on appeal, he may withdraw his plea. [*Reid*, at 337. Emphasis added].

In MCR 6.301(C)(2), the Court has incorporated and expanded *Reid* by allowing other forms of pleas [nolo contender, guilty but mentally ill, not guilty by reason of insanity] and by clarifying that the defendant may withdraw his plea if a specified ruling is overturned on appeal. See MCR 6.301(C)(2) and Staff Comment. In *Reid*, the Court recognized (and the People acknowledged) in that case that "they could not have proceeded with this prosecution without the evidence that Jordan and Reid sought to suppress." *Id*., at 334. In that regard, the People have to agree that MCR 6.301(C)(2) fails to incorporate that language, and would, therefore, suggest that the court rule be amended or modified to clarify that, in order for a defendant to be permitted to withdraw his plea, in addition to the pretrial ruling being reversed on appeal, the defendant must also demonstrate that the People would be unable to proceed against defendant without the fruits of the improper search or seizure.

The instant case provides the perfect example of why MCR 6.301(C)(2) should be amended to reflect this Court's ruling in *Reid*. In this case, under the mandates of the court rule, if the appellate court were to overturn the trial court's ruling on the 4th Amendment issue, regardless of whether or not the fruits of the search were necessary for Defendant's conviction, the defendant would be permitted to withdraw his plea. Such a result, however, would be contrary to the efficient administration of justice.

As will be detailed more fully in Argument IV, *infra*, and as supported by the APA's statements during the arguments on the 4th Amendment issue, the evidence garnered from the motel room and Defendant's arrest are, quite frankly, irrelevant to his conviction. All of the evidence necessary to convict him was present *before* he was arrested. Based on the videotape of the robbery, the testimony of the victim, the prior identification of Defendant by the officers involved, and the pre-arrest identification of his vehicle, there is very little question that a jury would find Defendant guilty even without his exculpatory statement that "Jack and Dave" forced him to commit the robbery. Since Defendant's statement is the only evidence from the motel that the People would consider using at trial, allowing Defendant to withdraw his plea if he "wins" an essentially irrelevant search and seizure issue would not advance the interests of justice.[4]

Moreover, allowing such a ruling would seriously diminish the usefulness of a conditional plea where the People would be less inclined to agree to a conditional plea where the evidence at issue is not crucial to a conviction, such as here. The People have maintained all along that the evidence at issue here is irrelevant. If the court rule mandates that plea withdrawal is permitted any time an appellate court overturns a suppression motion, regardless of the necessity of the "fruits" to conviction, then conditional pleas will only be agreed upon in cases where the "fruits" are the *only* evidence. Policy considerations, as recognized by the Court of Appeals (*Horacek*, *supra* at slip op 4) support following the mandates of *Reid* rather than the less than flushed out MCR 6.301(C)(2). For these reasons, the People urge this Court to amend the court rule to fully incorporate the conditional plea procedure as outlined in *Reid*.

[4] Arguably, MCR 6.301(C)(2) is not inconsistent with *People v Reid*, since as the United States Supreme Court and this Court have recognized, with the exception of structural errors, most cases are subject to harmless error analysis. See generally *People v Cain*, 498 Mich 108, 119 fn 4; 869 NW2d 829 (2015); *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991). The harmless error component is, thus, implied.

IV. DEFENDANT'S ENTITLEMENT TO RELIEF IS GREATLY IMPACTED BY THE FACT THAT ANY 4TH AMENDMENT VIOLATION WOULD BE HARMLESS BEYOND A REASONABLE DOUBT WHERE THERE IS OVERWHELMING "UNTAINTED" EVIDENCE OF DEFENDANT'S GUILT.

Standard of Review:

This Court reviews a preserved, non-structural error by determining whether the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

Discussion:

As argued by the APA during the motion to suppress, even if the trial court were to have found that an illegal entry and illegal arrest took place, any custodial confession following the illegal arrest would not be suppressed as long as there is sufficient probable cause to arrest the defendant. *People v Kelly*, 231 Mich App 627; 588 NW2d 480 (1998). Additionally, the "untainted" evidence in this case was overwhelming, therefore, even if the court were to suppress the evidence, and even if the arrest of Defendant was improper, the "untainted" evidence (which included Defendant committing the offense on video, being specifically identified by the investigating officers, renting the vehicle used during the robbery, and the testimony of the victim), was overwhelming evidence enough to obtain a conviction.

In this case, the police were already aware of Defendant and they were aware that he was a suspect in several breaking and entering cases in the area. Responding to the 911 call from the Dollar Value Store, Deputy Richardson recognized Defendant and his car from the video. A BOL went out on Defendant and his vehicle, and the car was spotted a short time later. Defendant's plate was run, and the officers learned that Defendant had rented the room that they entered. There was clearly probable cause to believe that Defendant would be found there.

A police officer may arrest an individual without a warrant if the felony has been committed and the officer has probable cause to believe that the individual committed the felony. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); MCL 764.15(c). The court will determine whether the facts available to the arresting officer at the time of the arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983).

As the APA argued during Defendant's motion to quash, there was a recording of the robbery where Defendant is easily identifiable. (MT, 27-28). There are still photographs of Defendant putting his hand in his left pocket and pointing it at the victim while he demands that she give him money from the cash register. (MT, 28-29). At first, she thought it was a joke, but then he became angry and she feared that he would use whatever was in his pocket to harm her. (MT, 29). Defendant was already a suspect in other B&Es in the area, and the deputy who viewed the videotape of the robbery identified both Defendant and the vehicle that he was known to be driving. (MT, 29-30). Clearly, there was sufficient probable cause to arrest Defendant before he was even known to be at the motel. See *People v Chapo*, 283 Mich App 360, 367; 770 NW2d 68 (2009).

As defense counsel acknowledged during his motion to suppress, his client "was not charged with anything related to" the evidence found in the motel room. (MT, 4). There were no "fruits" from the alleged 4th Amendment violation because Defendant was never charged with any crimes arising out of his presence at the motel room. Rather, as Defendant has argued, it is his contention that his "illegal arrest" should have resulted in the unarmed robbery charges being dismissed against him; that, however, is not the law.

An illegal arrest does not preclude the prosecutor from bringing a prosecution. *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992), citing *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974); *People v Dalton*, 155 Mich App 591, 597; 400 NW2d 689 (1986). Rather, the appropriate remedy is the suppression of evidence derived as a result of the illegal arrest under the "fruit of the poisonous tree" doctrine. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). If there had been any evidence from the robbery found in the motel room, then the evidence would have been suppressed if the trial court found a 4th Amendment violation. However, there was no evidence of the robbery found in the motel room; the only "evidence" was an arguably exculpatory statement (Dave and Jack made him do it) and Defendant himself. Since, however, Defendant's "body" would not be suppressed where there was probable cause to arrest him for the robbery, the evidence actually obtained was minimal. Therefore, as the APA pointed out during the motion to suppress, even if the court ruled against him, "we'd still be able to proceed because we have the testimony of the victim, we have the video. And we'd still be able to proceed." (MT, 19).

Knowing the People's position that there was still sufficient evidence to proceed against him even if the court found a 4th Amendment violation, Defendant tendered his no contest plea with the understanding that the appellate court could review his arguments. In exchange for his plea, Defendant received a *Cobbs* agreement to three months **below** the guidelines. Moreover, in exchange for the plea, the People did not file a motion pursuant to *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998), to reinstate the armed robbery charges where it was clear that the examining magistrate abused her discretion in failing to recognize that an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon is sufficient to support a charge of armed robbery, contrary to MCL 750.529.

Had the APA actually consented to the conditional plea while at the same time maintaining his position that there was still sufficient evidence to proceed against Defendant regardless of the court's determination on the 4th Amendment issue, the argument for Defendant would be that, if the appellate court found merit to his claims, then he could withdraw his plea. That, however, is not what occurred here. The People all along maintained that there was sufficient evidence to proceed to trial even without any evidence found in the motel room or his statement. By allowing Defendant to now withdraw his plea would be to ignore the arguments made during the relevant hearing. The APA knew that Defendant's position lacked merit because there was no evidence from the motel room needed to make the People's case against Defendant; he stated as much on the record. (MT, 19). To allow Defendant to withdraw his plea despite knowing that was the People's position would be unjust.

Defendant did, in fact, receive a benefit from pleading no contest prior to trial. He received a sentence below the guidelines and the People did not file a motion to reinstate the original armed robbery charges against him despite strong evidence that the appropriate charge was Armed, rather than Unarmed, Robbery. Defendant is a 19 times habitual offender, who is not a novice to the criminal justice system. The evidence against him in this case was overwhelming; the robbery was actually video recorded. The police have had many prior encounters with Defendant and at least one of the deputies identified Defendant by the video before his arrest. He is seen in the video with his hand in his pocket, thrusting it toward the victim while demanding money. The victim testified that she was afraid that Defendant would use whatever was in his pocket to harm her. In addition, she readily identified Defendant and was prepared to testify against him. There is very little argument to be made that Defendant would have been successful had he gone to trial.

Like any other case that goes before the appellate court, it remains up to the appellate court to decide whether or not a defendant is entitled to relief. The position of the People (that even if Defendant won the issue, he would still lose the appeal) was simply the People's position; the Court of Appeals agreed with that position. Had the appellate court found that there was a 4th Amendment violation AND that the evidence from the motel room was critical to the People's case, then relief would be warranted. Allowing a defendant to withdraw a plea any time the People correctly predict what will happen would be unfair, and would require every case where a defendant feels his argument has merit, to go to trial rather than taking advantage of the considerations received from pleading guilty or no contest.

As indicated previously, if Defendant withdraws his plea, he may lose the benefit of the three month departure below the guidelines range, thus, subjecting himself to a greater sentence where the *Cobbs* agreement will be voided, and the trial judge may find reasonable factors to increase the sentence. Further, as also previously indicated, it is the People's contention that the facts as established by the testimony of the victim, as well as the videotape and still photographs, demonstrate that the examining magistrate erred in finding that Defendant's hand in his pocket was insufficient evidence that he was armed. Should this case be remanded and brought back to a pretrial posture, the People will be filing a *Goecke* motion.

The People continue to maintain that an Armed Robbery conviction can be had based on the evidence available to be used at trial. There was no evidence of the robbery found in the motel room, and dismissal of the charges is not the remedy for an illegal arrest. Even assuming that Defendant's 4th Amendment claim should have been decided in his favor, the strength of the People's case is not diminished. If this matter is remanded, and the plea withdrawn, the People will move to reinstate the original charges, and stand ready to take this matter to trial.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Rae Ann Ruddy, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant's Application for Leave to Appeal, and affirm his conviction and sentence in the Oakland County Circuit Court.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
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